

# EXPOSURE DRAFT

EXPOSURE DRAFT
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Inserts for

## **Foreign Investment Reform (Protecting Australia's National Security) Bill 2020: Integrity amendments**

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**Commencement information**

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<b>Column 1</b>	<b>Column 2</b>	<b>Column 3</b>
<b>Provisions</b>	<b>Commencement</b>	<b>Date/Details</b>
1. Schedule 3	1 January 2021.	1 January 2021

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## 1 Schedule 3—Integrity amendments

### 2 Part 1—Change in control test

#### 3 *Foreign Acquisitions and Takeovers Act 1975*

##### 4 **1 At the end of section 40**

5 Add:

6 (7) However, the last condition in subsection (6) is not required to be  
7 met if:

8 (a) paragraph (2)(b) applies and the action is or is to be taken by  
9 a foreign person who controls the entity (whether alone or  
10 together with one or more associates) immediately before the  
11 action is or is to be taken; or

12 (b) paragraph (2)(c) applies and a foreign person controls the  
13 entity (whether alone or together with one or more  
14 associates) immediately before the action is or is to be taken.

##### 15 **2 At the end of section 41**

16 Add:

17 (6) However, the third condition in subsection (5) is not required to be  
18 met if:

19 (a) paragraph (2)(b) applies; and

20 (b) the action is or is to be taken by a foreign person who  
21 controls the business (whether alone or together with one or  
22 more associates) immediately before the action is or is to be  
23 taken.

##### 24 **3 Section 46 (paragraph beginning “Unlike”)**

25 Omit “Unlike for a significant action, there”, substitute “There”.

##### 26 **4 Application of amendments**

27 The amendments made by this Part apply in relation to actions taken, or  
28 proposed to be taken, on or after 1 January 2021.

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1 **Part 2—Buy-backs of securities and capital**  
2 **reductions**

3 *Foreign Acquisitions and Takeovers Act 1975*

4 **5 After section 15**

5 Insert:

6 **15A Rules relating to certain buy-backs of securities and capital**  
7 **reductions**

8 *Buy-backs of securities and capital reductions—effect of*  
9 *increasing proportion of voting power or proportion of interests in*  
10 *issued securities*

- 11 (1) Subsection (2) applies if:
- 12 (a) an entity buys back a security in itself or otherwise reduces  
13 its capital; and
- 14 (b) as a result of the buy-back or capital reduction, a person:
- 15 (i) increases the proportion of the total voting power, or the  
16 total potential voting power, in the entity that the person  
17 is in a position to control (whether alone or together  
18 with one or more associates of the person); or
- 19 (ii) increases the proportion of interests in issued securities  
20 in the entity that the person holds (whether alone or  
21 together with one or more associates of the person); and
- 22 (c) in the case of a buy-back where the result mentioned in  
23 paragraph (b) occurs other than by the person accepting an  
24 offer to buy back securities in the entity—the entity made the  
25 person such an offer.
- 26 (2) For the purposes of this Act, the person mentioned in  
27 paragraph (1)(b) is taken to acquire an interest in securities in the  
28 entity.
- 29 Note: As a result of this subsection, the buy-back or capital reduction might  
30 amount to the taking of a significant action or a notifiable action by  
31 the person mentioned in paragraph (1)(b).

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1 *Buy-backs of securities—no acquisition of interests in securities by*  
2 *entity*

- 3 (3) The buying-back of a security in an entity by the entity does not  
4 constitute an acquisition by the entity of an interest in a security in  
5 the entity.

## 6 **6 Application of amendment**

7 Section 15A of the *Foreign Acquisitions and Takeovers Act 1975*, as  
8 inserted by this Part, applies in relation to:

- 9 (a) a buy-back of securities in an entity for which an offer is  
10 made by the entity on or after 1 January 2021; and  
11 (b) a capital reduction that occurs on or after 1 January 2021  
12 (subject to paragraph (a)).

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## 1 **Part 3—Presumption of advancement**

### 2 *Foreign Acquisitions and Takeovers Act 1975*

#### 3 **7 At the end of section 12**

4 Add:

5 (4) If:

- 6 (a) a person (the *first person*) acquires a legal interest in  
7 Australian land (other than an interest covered by  
8 subparagraph (1)(a)(i), (ii) or (iii)); and  
9 (b) some or all of the consideration for the acquisition is given  
10 by another person (the *second person*); and  
11 (c) the second person does not, apart from this subsection,  
12 acquire an equitable interest in the Australian land by giving  
13 the consideration, because of the operation of a principle of  
14 equity that presumes the second person to have given the  
15 consideration as a gift for the first person;  
16 the second person is taken, for the purposes of this Act, to have  
17 acquired an equitable interest in the Australian land.

18 (5) However, a person does not acquire an equitable interest in  
19 Australian land under subsection (4) if the person proves the  
20 person gave the consideration as a gift for another person.

21 (6) The regulations may provide for and in relation to determining  
22 whether consideration is given by a person as a gift for another  
23 person for the purposes of this section.

#### 24 **8 Application of amendment**

25 The amendment made by this Part applies in relation to an acquisition  
26 of a legal interest in Australian land on or after 1 January 2021, whether  
27 consideration is given for the acquisition before, on or after that day.

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1 **Part 4—Businesses carried on by the**  
2 **Commonwealth, States, Territories or local**  
3 **governing bodies**

4 *Foreign Acquisitions and Takeovers Act 1975*

5 **9 Section 4**

6 Insert:

7 *business* has a meaning affected by subsection 8(3).

8 **10 At the end of section 8**

9 Add:

- 10 (3) Without limiting subsection (1), an activity carried on wholly or  
11 partly in Australia by:  
12 (a) the Commonwealth, a State, a Territory or a local governing  
13 body; or  
14 (b) an entity wholly owned by the Commonwealth, a State, a  
15 Territory or a local governing body;  
16 is both a *business* and an *Australian business* for the purposes of  
17 this Act if the activity would, or could, be carried on in anticipation  
18 of profit or gain if it were carried on by someone other than:  
19 (c) a body referred to in paragraph (a); or  
20 (d) an entity referred to in paragraph (b); or  
21 (e) a foreign government; or  
22 (f) a separate government entity.

23 **11 Application of amendments**

24 The amendments made by this Part apply in relation to actions taken, or  
25 proposed to be taken, on or after 1 January 2021.

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1 **Part 5—Tracing interests through unincorporated**  
2 **limited partnerships**

3 *Foreign Acquisitions and Takeovers Act 1975*

4 **12 Section 4 (definition of *aggregate interest*)**

5 Repeal the definition, substitute:

6 *aggregate interest*:

- 7 (a) of a specified percentage in an entity—has the meaning given  
8 by subsection 17(2); and  
9 (b) of a specified percentage in an unincorporated limited  
10 partnership—has the meaning given by subsection 17(2B).

11 **13 Section 4 (definition of *aggregate substantial interest*)**

12 Omit “entity or trust”, substitute “entity, trust or unincorporated limited  
13 partnership”.

14 **14 Section 4 (paragraph (a) of the definition of *aggregate***  
15 ***substantial interest*)**

16 Repeal the paragraph, substitute:

- 17 (a) for an entity or unincorporated limited partnership—the  
18 persons hold an aggregate interest of at least 40% in the  
19 entity or partnership; or

20 **15 Section 4 (note to the definition of *aggregate substantial***  
21 ***interest*)**

22 After “entity”, insert “or unincorporated limited partnership”.

23 **16 Section 4 (definition of *general meeting*)**

24 Repeal the definition, substitute:

25 *general meeting* means:

- 26 (a) for a corporation—a general meeting of the corporation; or  
27 (b) for a unit trust—a general meeting of the unit holders of the  
28 trust; or  
29 (c) for an unincorporated limited partnership—a general meeting  
30 of the partners of the partnership.

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## 17 Section 4

Insert:

*general partner* means a partner of a limited partnership whose liability relating to the partnership is not limited.

## 18 Section 4 (after paragraph (c) of the definition of *interest*)

Insert:

(ca) in an unincorporated limited partnership—has the meaning given by section 11A; and

## 19 Section 4 (after paragraph (e) of the definition of *interest*)

Insert:

; and (f) of a specified percentage in an unincorporated limited partnership—has the meaning given by subsection 17(2A).

## 20 Section 4

Insert:

*limited partner* means a partner of a limited partnership whose liability relating to the partnership is limited.

*limited partnership* means an association of persons that:

- (a) was formed solely for the purposes of becoming a partnership where the liability of at least one partner relating to the partnership is limited; and
- (b) is recognised under a law of the Commonwealth, a State, a Territory, a foreign country or a part of a foreign country as such a partnership.

## 21 Section 4 (definition of *substantial interest*)

Omit “entity or trust”, substitute “entity, trust or unincorporated limited partnership”.

## 22 Section 4 (paragraph (a) of the definition of *substantial interest*)

Repeal the paragraph, substitute:

- (a) for an entity or unincorporated limited partnership—the person holds an interest of at least 20% in the entity or partnership; or



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1 **23 Section 4 (note to the definition of *substantial interest*)**

2 After “entity”, insert “or unincorporated limited partnership”.

3 **24 Subsection 9(1) (note 2)**

4 Omit “and trusts”, substitute “, trusts and unincorporated limited  
5 partnerships”.

6 **25 Sections 10 and 11 (note 2)**

7 Omit “and trusts”, substitute “, trusts and unincorporated limited  
8 partnerships”.

9 **26 After section 11**

10 Insert:

11 **11A Meaning of *interest* in an unincorporated limited partnership**

12 A person holds an *interest* in an unincorporated limited partnership  
13 if the person:

- 14 (a) is in a position to control all or any of the voting power or  
15 potential voting power in the partnership; or  
16 (b) has contributed any or all of the assets or capital contributed  
17 to the partnership; or  
18 (c) is entitled to any or all of the distributions of capital, assets or  
19 profits of the partnership on the dissolution of the  
20 partnership; or  
21 (d) is entitled to any or all of the distributions of capital, assets or  
22 profits of the partnership otherwise than on the dissolution of  
23 the partnership.

24 Note: See also section 19 (tracing of substantial interests in corporations,  
25 trusts and unincorporated limited partnerships).

26 **27 Section 17 (at the end of the heading)**

27 Add “or unincorporated limited partnership”.

28 **28 After subsection 17(2)**

29 Insert:

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1                    *Meaning of **interest** of a specified percentage in an unincorporated*  
2                    *limited partnership*

- 3                    (2A) A person holds an **interest** of a specified percentage in an  
4                    unincorporated limited partnership if the person, alone or together  
5                    with one or more associates of the person:
- 6                    (a) is in a position to control at least that percentage of the voting  
7                    power or potential voting power in the partnership; or
  - 8                    (b) has contributed at least that percentage of the total amount of  
9                    assets or capital contributed to the partnership; or
  - 10                    (c) is entitled to at least that percentage of the total distributions  
11                    of capital, assets or profits of the partnership on the  
12                    dissolution of the partnership; or
  - 13                    (d) is entitled to at least that percentage of the total distributions  
14                    of capital, assets or profits of the partnership otherwise than  
15                    on the dissolution of the partnership.

16                    *Meaning of **aggregate interest** of a specified percentage in an*  
17                    *unincorporated limited partnership*

- 18                    (2B) Two or more persons (who are not associates of each other) hold  
19                    an **aggregate interest** of a specified percentage in an  
20                    unincorporated limited partnership if they, together with any one or  
21                    more associates of them:
- 22                    (a) are in a position to control at least that percentage of the  
23                    voting power or potential voting power in the partnership; or
  - 24                    (b) have contributed at least that percentage of the total amount  
25                    of assets or capital contributed to the partnership; or
  - 26                    (c) are entitled to at least that percentage of the total distributions  
27                    of capital, assets or profits of the partnership on the  
28                    dissolution of the partnership; or
  - 29                    (d) are entitled to at least that percentage of the total distributions  
30                    of capital, assets or profits of the partnership otherwise than  
31                    on the dissolution of the partnership.

32                    **29 Subsection 17(3)**

33                    After “entity”, insert “or unincorporated limited partnership”.

34                    **30 Section 19 (heading)**

35                    Omit “and trusts”, substitute “, **trusts and unincorporated limited**  
36                    **partnerships**”.

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## 31 Subsection 19(1)

Repeal the subsection, substitute:

(1) This section applies (subject to subsection (3)) if:

(a) any of the following apply:

- (i) a person holds a substantial interest in a corporation or trust (the *higher entity or partnership*);
- (ii) 2 or more persons hold an aggregate substantial interest in a corporation (the *higher entity or partnership*);
- (iii) 2 or more persons hold an aggregate substantial interest in a trust (a trustee of which is a *higher entity or partnership*);
- (iv) a person holds a substantial interest, or 2 or more persons hold an aggregate substantial interest, in an unincorporated limited partnership (a general partner of which is a *higher entity or partnership*);

including because of one or more applications of this section;  
and

(b) the higher entity or partnership:

- (i) is in a position to control all or any of the voting power or potential voting power in a corporation or unincorporated limited partnership (the *lower entity or partnership*); or
- (ii) holds interests in all or any of the shares in a corporation (the *lower entity or partnership*); or
- (iii) holds an interest in a trust or unincorporated limited partnership (the *lower entity or partnership*).

## 32 Subsection 19(2)

After “entity” (wherever occurring), insert “or partnership”.

## 33 Subsection 22(1)

After “an entity”, insert “or unincorporated limited partnership”.

## 34 Subsection 22(1)

After “the entity”, insert “or partnership”.

## 35 Subsection 22(2)

After “an entity”, insert “or unincorporated limited partnership”.

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1 **36 Subsection 22(2)**

2 After “the entity” (wherever occurring), insert “or partnership”.

3 **37 Subsection 22(3)**

4 After “an entity”, insert “or unincorporated limited partnership”.

5 **38 Paragraph 22(3)(a)**

6 After “the entity”, insert “or partnership”.

7 **39 Subsection 22(4)**

8 After “an entity”, insert “or unincorporated limited partnership”.

9 **40 Subsection 22(4)**

10 After “the entity”, insert “or partnership”.

11 **41 Section 23**

12 After “an entity”, insert “or unincorporated limited partnership”.

13 **42 Section 29 (heading)**

14 Omit “and entities”, substitute “, entities and unincorporated limited  
15 partnerships”.

16 **43 Paragraph 29(b)**

17 After “corporations”, insert “and unincorporated limited partnerships”.

18 **44 Application of amendments**

19 The amendments made by this Part apply in relation to actions taken, or  
20 proposed to be taken, on or after 1 January 2021.

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1 **Part 6—More coordinated information sharing and**  
2 **gathering**

3 *Foreign Acquisitions and Takeovers Act 1975*

4 **45 Section 4 (definition of *Commonwealth entity*)**

5 Repeal the definition.

6 **46 Paragraph 120(2)(c)**

7 Repeal the paragraph, substitute:

8 (c) the disclosure is made to:

9 (i) the Secretary; or

10 (ii) a person appointed or engaged under the *Public Service*  
11 *Act 1999* who is employed in the Department; or

12 (iii) a person appointed by the Commonwealth for the  
13 purposes of this Act;

14 **47 Section 122**

15 Repeal the section, substitute:

16 **122 Authorisation of disclosures to Commonwealth Ministers and**  
17 **Commonwealth bodies**

18 (1) A person may disclose protected information to a person covered  
19 by subsection (2) for the purposes of:

20 (a) administering a law covered by subsection (3); or

21 (b) a Minister discharging that Minister's responsibility for a  
22 matter covered by subsection (4).

23 (2) This subsection covers the following persons:

24 (a) a Minister who has responsibility for:

25 (i) administering a law covered by subsection (3); or

26 (ii) a matter covered by subsection (4);

27 (b) an individual who is:

28 (i) employed by such a Minister under Part III or IV of the  
29 *Members of Parliament (Staff) Act 1984*; or

30 (ii) engaged by such a Minister as a consultant under Part II  
31 of that Act;

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- 1 (c) an officer or employee of a Department of State, or of an  
2 authority or agency of the Commonwealth, administered by  
3 such a Minister.
- 4 (3) This subsection covers the following laws:
- 5 (a) the *Airports Act 1996*;
- 6 (b) the *Australian Crime Commission Act 2002*;
- 7 (c) the *Australian Prudential Regulation Authority Act 1998*;
- 8 (d) the *Australian Securities and Investments Commission Act*  
9 *2001*;
- 10 (e) the *Australian Security Intelligence Organisation Act 1979*;
- 11 (f) the *Banking Act 1959*;
- 12 (g) the *Competition and Consumer Act 2010*;
- 13 (h) the *Corporations Act 2001*;
- 14 (i) the *Defence Act 1903*;
- 15 (j) the *Financial Sector (Shareholdings) Act 1998*;
- 16 (k) the *Industry Research and Development Act 1986*;
- 17 (l) the *Inspector-General of Intelligence and Security Act 1986*;
- 18 (m) the *Insurance Acquisitions and Takeovers Act 1991*;
- 19 (n) the *Intelligence Services Act 2001*;
- 20 (o) the *Migration Act 1958*;
- 21 (p) the *Northern Australia Infrastructure Facility Act 2016*;
- 22 (q) the *Proceeds of Crime Act 2002*;
- 23 (r) the *Qantas Sale Act 1992*;
- 24 (s) the *Security of Critical Infrastructure Act 2018*;
- 25 (t) a taxation law (within the meaning of section 995-1 of the  
26 *Income Tax Assessment Act 1997*);
- 27 (u) the *Telstra Corporation Act 1991*;
- 28 (v) any other law prescribed by the regulations.
- 29 (4) This subsection covers the following matters:
- 30 (a) agriculture;
- 31 (b) water;
- 32 (c) infrastructure;
- 33 (d) telecommunications;
- 34 (e) industry policy;
- 35 (f) investment promotion;
- 36 (g) taxation policy;
- 37 (h) foreign investment in Australia;
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- 1 (i) defence;  
2 (j) national security.

3 **48 After section 123**

4 Insert:

5 **123A Authorisation of disclosures to foreign governments and**  
6 **separate government entities**

- 7 (1) A person may disclose protected information to a foreign  
8 government or a separate government entity in relation to a foreign  
9 country (or a part of a foreign country) if:  
10 (a) either:  
11 (i) the person discloses the information in performing the  
12 person's functions or duties, or exercising the person's  
13 powers, under this Act; or  
14 (ii) the person is satisfied the disclosure of the information  
15 will assist or enable the foreign government or separate  
16 government entity to perform a function or duty, or  
17 exercise a power, of the government or entity; and  
18 (b) the Treasurer is satisfied that the information relates to a  
19 matter in relation to which a national security risk may exist  
20 for Australia or the foreign country; and  
21 (c) the Treasurer is satisfied that the disclosure is not contrary to  
22 the national interest; and  
23 (d) the person is satisfied that the information will be used in  
24 accordance with an agreement to which subsection (2)  
25 applies; and  
26 (e) the foreign government or separate government entity has  
27 undertaken not to use or further disclose the information  
28 except in accordance with the agreement or otherwise as  
29 required or authorised by law.
- 30 (2) This subsection applies to an agreement that is in force between:  
31 (a) the Commonwealth or a Department of State, authority or  
32 agency of the Commonwealth; and  
33 (b) one or more of the following:  
34 (i) a foreign government;  
35 (ii) a separate government entity.

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1 (3) The Treasurer may, by writing, impose conditions to be complied  
2 with by a foreign government or a separate government entity in  
3 relation to protected information disclosed to it under  
4 subsection (1).

5 (4) An instrument under subsection (3) is not a legislative instrument.

## 6 *Taxation Administration Act 1953*

### 7 **49 Subsection 355-65(4) in Schedule 1 (after table item 7)**

8 Insert:

7A a person appointed by the is for the purpose of advising the  
Commonwealth for the purposes Treasurer in relation to the  
of the *Foreign Acquisitions and* administration of that Act  
*Takeovers Act 1975*

### 9 **50 Application of amendments**

10 The amendments made by this Part apply in relation to records,  
11 disclosures and uses of information on or after 1 January 2021, whether  
12 the information is obtained before, on or after that day.